

## INSIGHTS

## Biden Administration Finalizes Redefinition of "Waters of the United States"

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On December 30, 2022, the Environmental Protection Agency and the United States Army Corps of Engineers announced their finalization of the agencies' redefinition of the Clean Water Act's "waters of the United States" phrase, or "WOTUS", a key phrase in the Clean Water Act that determines the jurisdictional reach of the act. The rule will be effective 60 days from the rule's publication in the Federal Register, and a pre-publication copy of the rule is available [here](#).

According to the agencies, this rulemaking codifies the current approach—use of the 1986 regulations as implemented by the government following various Supreme Court decisions including the Supreme Court's 2008 *Rapanos* decision. WOTUS will include traditional navigable waters, territorial seas, and interstate waters; impoundments of WOTUS; tributaries to traditional navigable waters, adjacent wetlands, and intrastate water features that have "relatively permanent" flow to traditional navigable waters or have a "significant nexus" with those waters. The regulations incorporate language from the *Rapanos* decision that extends jurisdiction to tributaries that "alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of other jurisdictional waters, including traditionally navigable waters. Wetlands adjacent to such tributaries will also be jurisdictional, as well as certain intrastate waters that have either a continuous surface connection or significant effect on other waters. This revised definition of WOTUS finally undoes Trump-era regulatory reforms which themselves reduced the jurisdictional reach of the Clean Water Act. These Trump-era reforms were heavily litigated across the country, and eventually the Trump-era rule, known as the "Navigable Waters Protection Rule," was vacated by the federal district court in Arizona. Although the vacated regulatory text remained on the pages of the Code of Federal Regulations, EPA and the Corps began following the 1986 WOTUS rules as modified by subsequent Supreme Court caselaw and guidance while undertaking this rulemaking.

Although the EPA and the Corps have been implementing the 1986 WOTUS regulations for months now, this particular rulemaking is still significant for a few reasons. Where the Navigable Waters Protection Rule limited the reach of the Clean Water Act on the basis of statutory language and the *U.S. v. Rapanos* plurality opinion, the Biden Administration's rulemaking relies heavily on the Clean Water Act's statutory purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Instead of treating subsequent language in the Clean Water Act as a limitation on that purpose,

this Administration sees that subsequent language— including language describing environmental protections in the Act as “the primary responsibilities and rights of the States,” § 1251(b)—as ways to accomplish that overriding statutory purpose. The Administration’s focus on climate change and environmental justice is also evident in the rulemaking. The Administration sees mitigation of the effects of climate change and the protection of underserved communities as justifications for expanding the reach of the Clean Water Act through a revised definition of WOTUS.

Notably, EPA and the Corps do not appear to view the Supreme Court’s pending decision in *Sackett v. EPA*, or “*Sackett II*,” as posing significant risks to the agencies’ decision to rely on the significant nexus standard in establishing whether water features qualify as WOTUS. *Sackett II* involves EPA’s enforcement action against landowners who filled wetlands that are adjacent to Priest Lake—Bracewell has covered the content of the landowners’ and EPA’s arguments [here](#), and we will cover the Court’s opinion when it is published.

In addition to finalizing this rule restoring the substance of the 1986 WOTUS regulations, [EPA has at times indicated](#) that it will undertake a second rulemaking to further refine and update the 1986 regulations. Presently, the agencies have done little at this stage to describe the contents of a future rule, and the Administration’s ambitions for a future rule may be tempered by the Supreme Court’s ultimate decision in *Sackett II*.